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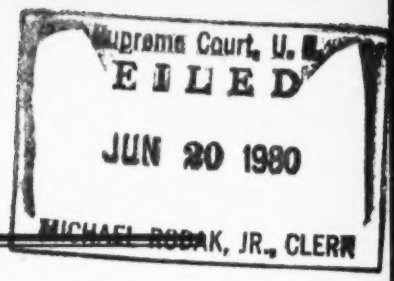

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM L. ELLIS,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statutes	3
Statement of the Case	4
Reasons for Granting the Writ	10
Appendix:	
Order of District Court	A-1
Order of Sixth Circuit	A-26
Order of 6th Circuit denying rehearing	A-30
Statutes:	
18 U.S.C. §371	A-31
§1341	A-31
29 U.S.C. §431	A-32
§439	A-34
§501	A-34

AUTHORITIES CITED

Cases

Abbott v. U.S., 239 F.2d 310 (5 Cir., 1956) 10

Anderson v. Mt. Clements Pottery Co., 328 U.S. 680 .. 10

Braverman v. U.S., 317 U.S. 49 5

Brown v. Fletcher, 237 U.S. 583 11

Fisher v. U.S., 327 F.2d 775 (8 Cir., 1963) cert. den. 377 U.S. 999 10

Horning v. District of Columbia, 254 U.S. 135 9

Jackson v. Virginia, ____ U.S. ____ 61 L.Ed. 2d 560 ... 2,9,10

Kotteakos v. U.S., 328 U.S. 750 5

Maryland Casualty Co. v. Jones, 279 U.S. 792 11

Moore v. U.S., 360 F.2d 353 (4 Cir., 1965) 10

Proctor v. Warden, Maryland Penitentiary, 435 U.S. 559 11

U.S. v. Ballard, 322 U.S. 78 11

U.S. v. Brown, 461 F.2d 912 (6 Cir., 1972) 11

U.S. v. Demetrie, 461 F.2d 971 (6 Cir., 1972) 10

U.S. v. Donahue, 539 F.2d 1131 (8 Cir., 1976) 10

U.S. v. Eley, 314 F.2d 127 (7 Cir., 1963) 10

U.S. v. Nance, 502 F.2d 615 (8 Cir., 1974) 10

U.S. v. Nunan, 256 F.2d 576 (2 Cir., 1956) 10

Statutes

18 U.S.C.	§371	3,4
	§1341	3,4
28 U.S.C.	§1254(1)	2
29 U.S.C.	§439(b)	3,4
	§501(b)	3,7
	§501(c)	2,3,4,7,10

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Petitioner, William L. Ellis, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming his conviction in the United States District Court for the Middle District of Tennessee, Nashville Division.

OPINIONS BELOW

The Appendix contains the opinion of the United States District Court for the Middle District of Tennessee (*infra,* pp. A-1 — A-25) and the Orders of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction

(*infra,* App. B pp. A-26 — A-29) and denying the Petition for Rehearing (*infra,* App. C p. A-30).

Such opinions and order have not yet been published in any official or unofficial reports.

JURISDICTION

i. The judgment of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction was entered March 24, 1980.

ii. The Order denying the Petition for Rehearing was entered May 23, 1980. No time extension for filing the Petition for Certiorari has been sought or granted.

iii. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant has been accorded proper appellate review under the standards of *Jackson* v. *Virginia,* — U.S. —, 61 L.Ed.2d 560, by an order endeavoring to state reasons for affirmance of his eleven-count convictions when such order--

(a) Inaccurately stated the facts relating to five conspiracy/mail fraud counts by failing to note important *government* evidence contrary to the Court's factual theory;

(b) Summarized, with important inaccuracies, the government's evidence as to payments made to petitioner, a local union president, by a debtor of the union without considering petitioner's statutory construction contention that such could not constitute a conversion of an asset which *had become* property of the union, contrary to 29 U.S.C. § 501(c);

(c) Summarized as "indirect" and "sufficient" evidence as to abuse of the union's telephone and telephone credit cards without noting that the *government* proved petitioner's calls unrelated to union business totalling only $2.07, $7.66, and $1.80, in three successive years, that these personal calls were made to a city other than the cities identified by the indictment as the terminal points of personal phone calls at union expense, in disregard of the fact that the *government's* proof showed that unauthorized calls made by third parties were made without petitioner's knowledge, and in disregard of the fact that the learned District Judge had sustained judgments of guilt upon the theory that jurors can base their verdicts upon speculation instead of evidence.

2. Upon an appeal of right from a criminal conviction, is a Court of Appeals justified in finding as without merit and therefore frivolous serious defensive arguments--

(a) That the *de minimus* doctrine applies to proof of conversion and of failure by union president to report receipt of benefits totalling approximately $10 over a three-year period;

(b) In relation to a union president's receipt of payments from a third person, that the civil liability provision of 29 U.S.C. §501(b) and the criminal liability provisions of 29 U.S.C. § 501(c) must be construed *in pari materia* in view of the differences therein;

points of law upon which neither that Court nor this Court has ever rendered an opinion.

STATUTES

The Statutes which the case involves, reprinted in the Appendix, are 18 U.S.C. §§ 371 and 1341, and 29 U.S.C. §§ 431, 439 and 501.

STATEMENT OF THE CASE

The jurisdiction of the Court of first instance was based upon an indictment by its Grand Jury charging the federal offenses of conspiracy to commit mail fraud, substantive mail fraud offenses, conversion of Union assets and filing annual LM-2 reports with the Department of Labor which were false in their failure to report Petitioner's receipt of such converted assets, all in violation of 18 U.S.C. §§ 371 and 1341 and of 29 U.S.C. §§439(b) and 501(c).

Under the stated questions, the material facts are the government's proof construed favorably to it in relation to the offenses charged, the theories advanced for reversal, and the appellate response thereto.

The indictment presented four separate theories of criminal liability. The mail fraud theories were based upon the sale of advertisements for three publications claiming themselves to be sponsored by Petitioner's local union. The conspiracy/mail fraud publications were government witness Stamps' "Labor News" and co-defendant Lewellen's[1] "Labor Journal" (Counts I-VI), and the mail fraud publication was deceased Florida publisher Pomporini's "Tennessee Teamsters' Yearbook" (Counts VII-XII), as to which acquittal was directed because the government proved that the Union's governing body had sponsored the latter publication.

The theory of the first conversion charge was that for his publication rights, Pomporini owed the local Union one thousand dollars which he never paid; but that instead two $500 payments made to Petitioner constituted a conversion of Union assets prohibited by 29 U.S.C. § 501(c). The second conversion

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[1]The co-defendant's case was severed for institutional diagnosis as to his mental capacity to stand trial.

theory was that Petitioner converted Union assets by making personal telephone calls over the Union's telephone, and that he caused the Union to pay for long distance calls made to race tracks and other such places in matters unrelated to the Union's business (Count XIV). The final offenses charged were that Petitioner failed to report on three annual LM-2 reports to the Department of Labor the benefits he received as Union President in payment for his personal telephone calls which were among the Count XV unauthorized calls (Counts XVI-XVIII).

Following is a summary of the government's proof, the defensive appellate contentions, and the rationale of the Court of Appeals regarding these four groups of offenses--the Stamps and Lewellen publications, the Pomporini $500 payments, the telephone usage, and the LM-2 reports.

Regarding the Stamps-Lewellen publications, the Court of Appeals correctly summarized defensive contentions that although the government proved corrupt involvement by Petitioner in sponsorship of Stamps' paper, there was no proof that the mails were used in this scheme so as to bring it within the mail fraud statute; and that although the government proved extensive use by Lewellen of the mail in his subsequent publications, there was no proof that Petitioner was a party to that scheme. In viewing the two papers as one continuing scheme, the Court took no note of other aspects of the *government's* proof: That Petitioner insisted the Court must analyze for itself to determine whether there were single or successive conspiracies under *Braverman* v. *United States,* 317 U.S. 49, and *Kotteakos* v. *United States,* 328 U.S. 750. That Stamps and Lewellen had previously been employed as ad-sellers by another "publisher" working under the claimed auspices of a Veterans' organization and utilizing runners instead of the mails to pick up ads and money; that the government affirmatively proved that Stamps used runners in his solicitation for two issues he

published,[2] with Lewellen being one of the runners. That after Stamps ceased publishing and left Tennessee almost two years passed before Lewellen commenced publishing with his efforts proven by records of his bank account opened and utilized thereafter, testimony of advertisers, testimony of the printers who printed his four issues and copies of each of the four issues Lewellen printed. And that after Stamps returned to Tennessee, he resumed his employment with the Veteran's paper and did not until later begin working as an employee of Lewellen as an ad solicitor, without any duty or authority relating either to the publication's bank account or to its printing.

In regard to the Pomporini payments, the Court of Appeals correctly noted that the contract obligated Pomporini to pay the Union $1,000.00 for the first year's publication, that Pomporini had made two $500.00 payments to Petitioner, and the Court concluded that the jury could discredit Petitioner's testimony as to an innocent reason for the payments to him personally and could infer that these payments, totalling the amount due the Union and made "in close proximity to each other, was money due to the Union." (*infra.*, p. A-28). Actually, the payments were three years apart. The Court took no notice of the fact that the government offered no evidence as to the purpose of the two payments but merely proved that they were made by Western Union Money Orders on two occasions when Petitioner was present in Florida. The Court took no note of defensive legal

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[2]In light of Petitioner's continuing insistence upon his innocence it should be said that these concessions as to government proof are required by respect for the jury's right to determine credibility. It seems not inappropriate, however, to point out that as contrasted with the Lewellen operation, the government did not corroborate Stamps' testimony with any bank records relating to monies he received from ads, the testimony of any printer claimed to have printed his papers, of any reader claimed to have examined them, or of any advertiser claimed to have advertised in them, nor did the government produce any copies of the papers themselves.

contentions: For a Union officer to be guilty of the crime of converting Union assets in violation of 29 U.S.C. § 501(c), the government must prove that the asset had become property of the Union at the time of its conversion. Statutory construction of Sec. 501 requires this because sub-section (a) imposes the fiduciary capacity upon certain Union officials, sub-section (b) creates a *civil* cause of action in which violation of the fiduciary obligation is essential by the plain words of the enactment, but that the specific elements of the crime created by sub-section (c) does not include fiduciary capacity or violation of fiduciary obligations but merely subjects to equal criminal liability both officers *and employees* for committing listed common-law torts or crimes in relation to Union assets. The Court took no note of defensive contention that Pomporini, utilizing negotiable instruments to make two payments to Petitioner, transferred legal title directly into his name and that the Union never held legal title to those negotiable instruments, even though Petitioner at all times conceded that Pomporini was obligated to pay *some* $1,000.00 to the Union.

Regarding the telephone usage, the government's proof and corresponding supporting theories fell into three different categories. The first was personal calls made by Petitioner over the Union telephone to a veterinarian supply house in South Carolina for amounts totalling $2.07, $7.66 and $1.80 in three successive years. Defensive contentions, aside from reliance on appellant's testimony, were: The indictment, charging calls to race tracks and veterinarian supply houses in a number of different cities, did not mention any city in South Carolina so that the calls proven were not alleged in the indictment but if alleged, that the *de minimus* rule bars conviction for such small amounts. The Court of Appeals made no mention of either of these contentions or the adequacy of proof thereunder.

As to the second group of calls, the government proved that appellant gave his Union credit card number to two non-members for the purpose of making calls on Union business; it proved that these individuals utilized the credit card number to charge to the Union many of their own personal telephone calls but it proved that they did this without the appellant's knowledge. The third category of telephone calls included all phone calls made during the years in question to or from phone numbers belonging to race tracks, nearby motels, etc., not shown by the records to have been made by Petitioner to the South Carolina telephone mentioned above. The governments' evidence also showed, by cross-examination of present or former Union officers and employees, that Petitioner was many times present at or near race tracks near where he had official grievance or negotiating functions to perform. The government did not identify the individuals making any call nor offer evidence as to the subject matter of any identified telephone call except for the three years' calls that Petitioner personally made to the South Carolina veterinarian supply company.

It was Petitioner's contention that such calls could not be attributed to him, even though he signed most checks for the monthly telephone bills, without a showing that they were unrelated to Union business, in view of the fact that he has many times been present near race tracks necessitating calls being made to him and responsive calls being made by him on Union business due to his presidency of the local Union; and without proof of either the identity of the individuals making the calls, the individuals to whom the calls were made, or the subject-matter of the calls.

In its discussion of these charges, the learned Court of Appeals made no mention of these defensive positions, no allusions to the evidentiary deficiencies in the government's proof. The Court of Appeals made no reference to the District Court's justification of the judgments of guilt on these counts upon the theory that the jury was permitted to speculate as to guilt under

their authority to render criminal decisions contrary to both the law and the facts, as enunciated in *Horning* v. *District of Columbia,* 254 U.S. 135, 138. Regarding the propriety of a jury's use of its discretion to speculate as to innocence by speculating instead as of guilt as a basis of its verdict, the learned Court of Appeals took no note of this Petitioner's assertion: "The view espoused by the District Court is a view rejected by the Supreme Court: 'The power of the fact-finder to err upon the side of mercy, however, has never been thought to include the power to enter an unreasonable verdict of guilty.' *Jackson* v. *Virginia, supra,* 61 L.Ed.2d at p. 572, n. 10." (Court of Appeals Brief, p. 40).

Petitioner presented a far more detailed summary of the evidence in his brief to the Court of Appeals, and counsel represents to this Court that the government, in its response, did not endeavor to point out any inaccuracy in Petitioner's summary of the pleadings, the evidence, the legal positions taken or the actions of the District Court.

REASONS FOR GRANTING THE WRIT

The decision of the learned Court of Appeals is in conflict with the applicable decision of this Court in *Jackson* v. *Virginia, supra.* In its treatment as frivolous Petitioner's urging that the *de minimus* doctrine governs in application of statutes concerning conversion by Union officials and reporting of benefits received by them, the Court's decision was in apparent conflict with the rationale as to application of the *de minimus* doctrine enunciated in *Anderson* v. *Mt. Clements Pottery Co.,* 328 U.S. 680, 692, and also in conflict with the customary application of that rule in criminal income tax cases in the jury charge that the amount of the income under-statement must be substantial, *U.S.* v. *Eley,* 314 F.2d 127 (7 Cir., 1963), *Moore* v. *U.S.,* 360 F.2d 353 (4 Cir., 1965), *U.S.* v. *Nunan,* 256 F.2d 576 (2 Cir., 1956). The action of the Court of Appeals in regard to other issues either described above or growing from the legal and factual positions described above could be stated as in conflict with decisions of other circuit courts of appeals.[3]

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[3] For example, had the Court performed the Braverman-Kotteakos obligation to determine from the evidence whether the Stamps-Lewellen schemes, if credited, were a single conspiracy or multiple conspiracies, the recognition of their separateness would have rendered the Court's decision sustaining conviction for conspiracy to commit mail fraud in conflict with the holdings of other Circuit Courts that while a prior contemplation of use of the mails is not necessary for the substantive crime of mail fraud, it is necessary for the crime of conspiracy to commit mail fraud, *Fisher* v. *U.S.,* 327 F.2d 775 (8 Cir., 1963), *cert. denied,* 377 U.S. 999; *Abbott* v. *U.S.,* 239 F.2d 310 (5 Cir., 1956); and *U.S.* v. *Donahue,* 539 F.2d 1131 (8 Cir., 1976).

If the Court had considered and upheld Petitioner's statutory construction argument concerning the proper construction of 29 U.S.C. § 501(c), then its failure to reverse for the District Court's refusal to charge the jury that it must be proven that property has become the property of a Union before a Union officer can be convicted of converting Union property, would have presented a conflict, because of holdings that a Court is obligated to give a requested charge accurately defining the elements of the criminal offense unless covered elsewhere. *U.S.* v. *Nance,* 502 F.2d 615 (8 Cir., 1974); *U.S.* v. *Demetrie,* 461 F.2d 971 (6 Cir., 1972); *U.S.* v. *Brown,* 461 F.2d 912 (6 Cir., 1972).

However Petitioner conceives that such re-presentation to this Court would amount to an endeavor to entice this Court into performing the function of the Appellate Court of first resort instead of the Appellate Court of last resort.

Hence, Petitioner believes and asserts that the writ should be granted because the Court of Appeals has so far departed from the accepted course of judicial proceedings and in some respects has so sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision. And in this aspect, the case presents a question of law which should be but has not been decided by this Court, concerning the obligations of an Appellate Court in deciding an appeal of right raising substantial questions in a criminal case.

Where such questions are not frivolous on their face, it is assumed that the appeal of right vested in a defendant imposes upon an appellate court the obligation to consider issues whose answer favorable to a defendant would require reversal and to consider issues whose answer would require modification of the decision being rendered by the appellate court. *Maryland Casualty Co.* v. *Jones,* 279 U.S. 792, 796-797; *Brown* v. *Fletcher,* 237 U.S. 583, 588; *United States* v. *Ballard,* 322 U.S. 78, 88.

Petitioner submits that in disposing of an appeal of right, the obligation of the Appellate Court, at the very least, includes the obligation imposed upon the judges to sufficiently acquaint themselves with the record and with the Brief of Appellant—the instrument which the Court is challenged to judge—to permit them to rationally decide the issues presented. Certainly, when an Appellate Court, in disposing of an appeal of right, merely cites one case which is irrelevant to the issues raised by the appeal, then the appellate function has not properly been performed. *Proctor* v. *Warden, Maryland Penitentiary,* 435 U.S. 559. Similarly when, as here, the order in the nature of an opinion presents multiple glaring inconsistencies with both the

record and with the contentions made by the appellant, no appellant can believe that his case has received the study and the thought merited by an appeal which raises serious questions.

Hence, Petitioner avers that this case does present a departure from the accepted and usual course of appellate procedure. It is a departure which Petitioner believes cries out for thorough consideration by this Court. For the past several years, the volume of cases handled by the intermediate appellate courts has grown great to the extent that many decisions are rendered without the enunciation of any rationale and a record of decision finds publication only in tables in the Federal Reporter, Second Series. Each of these represents a *possibility* that litigants leave the courts with the belief that their cases have never received serious consideration. Each judicial opinion, even with the brevity of those by Justice Holmes, enhances the respect in which the judiciary is held, often enabling litigants to perceive the wrongness of their legal positions. Each appellate decision which leaves litigants with the impression that their cases have not been considered thoughtfully and with adequate knowledge carries with it the capacity to lessen confidence in the judicial system.

This Court's consideration of the subject of the rights which inhere in the appeal of right and the obligations imposed upon those deciding an appeal of right would be of inestimable value to the bench, the bar and to defendants who go to prison believing no court has ever heard, read, or given thought to their arguments.

WHEREFORE, Petitioner prays issuance of the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

No. 78-30269-NA-CR

United States of America,
Plaintiff,

v.

William L. "Corky" Ellis, et al.,
Defendants.

MEMORANDA OPINIONS AND ORDERS

(Filed March 28, 1979)

The jury found the defendant Mr. William L. ("Corky") Ellis guilty as charged in counts one through six, inclusive, and fourteen through eighteen, inclusive, of the indictment herein. After the discharge of the jury, Mr. Ellis elected timely to renew his earlier motion for entry of a judgment of acquittal[1] as to each of those 11 counts. Rule 29 (c), Federal Rules of Civil Procedure.

In deciding such motion, the crucial consideration is whether the evidence as to each such count was sufficient to sustain a conviction under that count; in other words: whether there was relevant evidence from which the jury could have found or in-

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[1] It is not incumbent upon this Court to ascertain whether Mr. Ellis' election along this line will preclude his relying on the grounds of his renewed motion for entry of a judgment of acquittal on any appeal herein. *See* Rule 4 (b), Federal Rules of Appellate Procedure. With such a possibility in prospect, however, in fairness to Mr. Ellis, the Court accorded that motion and those grounds ex..nsive and intensive consideration against the possibility that he may not be able to "take another bite out of the same apple" before an appellate court.

ferred properly beyond a reasonable doubt that the defendant is guilty as charged. *American Tobacco Co.* v. *United States* (1946), 328 U.S. 781, 787 n. 4, 66 S. Ct. 1125, 90 L. Ed. 1575, 1582 n. 4. The late Judge Prettyman expressed the guiding rule this way:

* * * * * *

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence under which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

Curley v. *United States,* C. A. D. C. (1947), 160 F. (2d) 229, 232-233, certiorari denied (1947), 331 U. S. 837, 67 S. Ct. 1511, 1512, 91 L. Ed. 1850; *accord: United States* v. *Gaines,* C. A. 6th (1965), 353 F. (2d) 276, 278 [8].

The evidence at this juncture in the proceedings is to be viewed in the light most favorable to the prosecution. *Glasser* v. *United States* (1942), 315 U. S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680, 704 (headnote 17); *United States* v. *Collon,* C. A. 6th (1970), 426 F. (2d) 939, 942 [2]. In that light, the Court views the evidence as follows:

> Historically, presidents of the local labor organization of Teamsters at Nashville, Tennessee (union) seem to have managed its treasury as if it were their private preserve. As

an example, while serving in this capacity, Mr. Don Vestal operated to his own private gain, with no ostensible benefit to the union, a newspaper in which business concerns and individuals who desired the good-will of the union purchased advertising (of dubious value to them). That publication was printed upon presses located in the basement area of the union headquarters. Eventually, Mr. Vestal was removed from his office by judicial fiat, and the union was operated under a trusteeship of its parent, international-union.

Mr. Ellis was the first member-elected president of the union after the termination of that trusteeship. Along the way, those printing presses were moved from the union's headquarters-building, and there has not been since an equally blatant perversion of the union's prestige for private gain.

To fill this void and for private fiscal enhancement, Mr. Ellis entered into a two-pronged conspiracy to profit personally from publications, established by others, seeking to reap the harvest of the then-untapped available advertising revenues. On behalf of the union, he entered into a contractual arrangement with D. & P. Associates, Inc. (D. & P.), represented by a Mr. Pomporini, whereby D. & P. would publish 3 annual editions of the *Tennessee Teamster's Yearbook (Yearbook),* and the union would be paid a minimum of $1,000 a year from the proceeds.

Belatedly, the union "accepted" this project, but none of the cash consideration it was to be paid therefrom ever reached its treasury; Mr. Pomporini paid a sum of money to Mr. Ellis (which Mr. Ellis testified was in repayment of a personal loan and constituted in no part union funds). In any event, no money received from Mr. Pomporini or D. & P. was placed in the union's treasury by Mr. Ellis.

Mr. Ellis also entered into an agreement with Mr. Cecil Stamps, a convict at time of trial, for the publication of the *Tennessee Labor News (News),* The union at no time acquired any property or other interest in this newspaper, but Mr. Stamps made cash payments to Mr. Ellis for the latter's tolerance of this project. But 2 editions of this publication were issued, after which Messrs. Stamps and Ellis decided to allow advertisers therein "* * * to rest a little while. * * *" At the conclusion of this rest-period, publication was resumed, this time under the name, *The Tennessee Labor Journal (Journal).*

Mr. Ellis' codefendant Mr. Nelson T. Lewellen, not on trial jointly with him, was a coconspirator with Messrs. Ellis, Pomporini and Stamps. He acquired in the Nashville, Tennessee Post Office rental post office box no. 8162 in the name of the *Journal* and utilized the mail extensively in connection with the business of that publication.

Throughout, it was a part of the scheme agreed upon by the conspirators to keep the operation of these publications as far removed in the public view from Mr. Ellis as possible, and to conceal from advertisers whether these publications were, or were not, projects which benefitted the union and its general membership. As many of the advertisers were in places far removed from Nashville, it was an essential part of the conspirators' plot that the mail be used by advertisers to pay the *Journal* for the advertisements which had been purchased. 5 or more of these respective advertisers were caused by Mr. Ellis, through one or another of his coconspirators, to utilize the mail in the execution of their scheme.

The interest the union acquired by contract in the publication of the *Yearbook* was a property-interest, and Mr. Ellis converted that interest to his own use or the use of some other person.

The foregoing is believed to be a fair statement of the essential facts of this lawsuit as they relate to all counts of the indictment, under which Mr. Ellis was convicted, with the exception of the latter (numerically) 4 counts thereof. As to those latter counts, the salient facts under the view most favorable to the prosecution are:

> The union furnished Mr. Ellis with an automobile; he was authorized to use this vehicle for his personal and private business as well as for union business. Mr. Ellis' telephone tolls on union business were authorized also by the union; but, he was not authorized to charge tolls which related to his personal and private business to the union's telephones. Mr. Ellis was authorized (implicitly or expressly) also to use a credit-card to charge to the union's telephones long distance tolls on union business for calls which he made on telephones other than the union's telephones; he was not authorized by the union to authorize anyone else to charge telephone tolls to its telephones unless for the benefit of the union.
>
> Mr. Ellis made personal long distance telephone calls at union expense to order veterinary supplies for his horses. He engaged on his private business 2 different persons to train and otherwise attend to his personal racehorses, including racing them in Louisiana and Florida. One of these trainers, Mr. John Thomas Hickman, used the automobile, assigned to Mr. Ellis' unrestricted use, to transport one of Mr. Ellis' racehorses. Mr. Ellis gave Mr. Hickman the number of the union's telephone credit-card and instructed him to utilize it as necessary in connection with that transportation. Mr. Hickman charged one such call on that card for such reason; however, thereafter, Mr. Hickman also charged his personal calls placed to his own relatives on that card.

The other trainer, Mr. George Akin, was also given such number by Mr. Ellis, to use in contacting by telephone unemployed members of the union, with whose whereabouts Mr. Akin was more familiar than Mr. Ellis, and conveying to them information relating to job-openings to be filled on the referral of the union. Mr. Akin went farther and allowed his nephew to charge on the card telephone tolls for calls he made from Louisiana and Florida to his girlfriend back in Tennessee. In an 11-month period, Mr. Akin was responsible in this manner for the charging of tolls to the union's telephones in the aggregate amount of some $1,000.

Mr. Ellis, as president of the union, was an essential signatory on annual reports of the union under the Labor-Management Reporting and Disclosure Act, 29 U. S. C. §§ 401, et seq. His salary and other compensation from the union exceeded $10,000 annually. He was required to disclose, or cause the union to disclose, all material facts concerning his salary, allowances, and other direct and indirect disbursements to himself as such officer. 29 U. S. C. § 431 (b) (3). In reports for the respective years, 1974-1976, inclusive, Mr. Ellis failed to disclose, or cause to be disclosed by the union, the compensation he received represented by the value of the aforementioned telephone calls. This misrepresentation or failure to disclose a material fact, knowing the representation to be false, was done knowingly by Mr. Ellis. *See* 29 U. S. C. § 439 (b).

The immediately foregoing is believed to be a fair statement of the facts of this lawsuit as they relate to the final 4 counts of the indictment. From the foregoing (in its entirety), it will be seen readily that the evidence was sufficient to sustain Mr. Ellis' conviction under count fourteen. The jury could have deducted inferentially that the money Mr. Pomporini paid Mr. Ellis belonged to the union as a property-right under its contract with

D. & P., and that Mr. Ellis, with intent to defraud, converted that money or property of the union to his own use or the use of someone else.

The evidence was sufficient to sustain Mr. Ellis' conviction under count fifteen also, unless the jury accredited Messrs. Ellis, Hickman and Akin perfectly as witnesses and gave full weight to their testimony exculpating Mr. Ellis. By its verdict on this count, the jury appears on this point to have discredited those witnesses or given their exculpatory testimony little or no weight. The jury could have inferred reasonably that Mr. Ellis extended Messrs. Akin and Hickman *carte blanche* to use the union's telephone credit-card anyway each of them chose.

Despite the fact that there was no direct evidence probative of the fact that Mr. Ellis allowed Messrs. Akin and Hickman and any person(s) they might designate to use this card at-will, this was a finding nevertheless, the jurors could have made by reasonable inference upon assessing the credibilities and weights of the witnesses and the pertinent testimony. In a criminal action such as this, the jury "* * * has the power to bring in a verdict in the teeth of both law and facts.* * *" *Horning* v. *District of Columbia* (1920), 254 U. S. 135, 138, 41 S. Ct. 53, 65 L. Ed. 185, 186-187. "* * * [J]uries are not bound by what seems inescapable logic to judges.* * *" *Morissette* v. *United States* (1952), 342 U. S. 246, 276, 72 S. Ct. 240, 96 L. Ed. 288, 307.

Mr. Ellis would have this Court apply the *de minimis* rule, which is applied in some criminal prosecutions, and set-aside the verdicts of the jury as to counts fifteen through eighteen, inclusive, because the amounts of the telephone calls involved are comparatively small, when all the annual disbursements of the union are taken into account. The Court cannot do this appropriately.

The Congress fashioned an entirely new crime in the enactment of 29 U. S. C. § 501 (c), the scope of which is far more extensive than that applied to acts of a somewhat similar nature

which had been made federal crimes earlier. *United States* v. *Nell,* C. A. 5th (1976), 526 F. (2d) 1223, 1232 [15]. The Labor-Management Reporting and Disclosure Act, *supra,* of which it is a part, was based upon congressional findings that:

* * * * * * *

> The members of a labor organization are the real owners of the money and property of such organizations and are entitled to a full accounting of *all* transactions involving such money and property. Because union funds belong to the members they should be expended *only* in furtherance of their common interest. A union treasury should not be managed as though it were the private property of the union officers, however well-intentioned such officers might be, but as a fund governed by fiduciary standards. [Emphasis added.]

* * * * * * *

House Report no. 741 of the Committee on Education and Labor. So, all of the funds of a labor organization must be treated as trust funds belonging to the union's members. *United States* v. *Goad,* C. A. 8th (1974), 490 F. (2d) 1158, 1162 [2], certiorari denied (1974), 417 U. S. 975, 94 S. Ct. 3068, 41 L. Ed. (2d) 665. If any of those funds have been unlawfully converted or not properly reported, crimes have been committed.

Mr. Ellis claims that evidence is lacking to support his conviction under (the conspiracy) count one of the indictment, in that it was not proved that the conspirators contemplated the use of the mails in furtherance of their fraudulent scheme relating to the publication of the *Journal.* This contention likewise has no merit.

Once the jury found that a conspiracy to defraud advertisers in the publication under consideration had been devised, and letters had been mailed in the execution of that scheme, it was not necessary for the jury to have found in addition "* * * that

the scheme contemplate[d] the use of the mails as an essential element * * *" of the crime, so long as the jury found that the mailing "* * * was incident to an essential part of the scheme. * * *" *Pereira* v. *United States* (1954), 347 U. S. 1, 8, 74 S. Ct. 358, 98 L. Ed. 435, 444 (headnote 9); *accord: United States* v. *Maze* (1974), 414 U. S. 395, 400, 94 S. Ct. 645, 38 L. Ed. (2d) 603, 608 [5], and *United States* v. *Street,* C. A. 6th (1976), 529 F. (2d) 226, 228-229 [1].

Mr. Ellis takes the position that, if there were any conspiracies herein, they were separate as regards the *Journal,* on the one hand, and the *News,* on the other. He assumed in his brief that the Court had "* * * already recognized * * *" this separateness.

The distinction the Court had in mind related to the *Yearbook,* on the one hand, and the *Journal,* on the other. There was allusion to this in the Court's memorandum opinion and order herein of February 16, 1979, in which the Court withdrew from the further consideration of the jury counts seven through thirteen, inclusive, of the indictment.

As the Court understood the evidence at that time, the bilking of the advertisers in the *Yearbook* was predicated by the prosecution on the statement, it claimed to have been false, fraudulent, and misleading, that the *Yearbook* was authorized and sponsored by the union It was undisputed in the evidence that the *Yearbook* project was indeed accepted by the union; so, such statement was neither false, fraudulent, or misleading.

Regarding count thirteen, it was demonstrated affirmatively that the union at no time had as an asset any money, ownership or property-interest in the *Journal.* This being true, Mr. Ellis could not have knowingly converted to his own use or the use of someone else "* * * money, property or other assets * * *" *of* the union in relation to the *Journal,* as opposed to the *Yearbook.*

The evidence was sufficient also to sustain a conviction of Mr. Ellis as an aider-and-abettor of Messrs. Stamps and Lewellen, or one of them respectively, in causing the various checks to be mailed to the post office box of the *Journal* in payment of advertising therein, as charged in counts two through six, inclusive, of the indictment. Reiterating to some extent, there was evidence of a conspiratorial scheme by Messrs. Ellis, Lewellen, Stamps and others to bilk advertisers fraudulently and obtain money in this way from them upon known false representations, as charged in each of the counts now under consideration; that Messrs. Lewellen or Stamps, or one of them respectively in each instance, knowingly caused mail-delivery of a check in payment of such advertising; that the causing of the mails to be used in this manner was done by them willfully and with the specific intent by Mr. Ellis to carry-through the scheme he had participated in devising; and that, although he did not do any of these acts physically himself, he aided-and-abetted his coconspirators in so doing and/or caused willfully these acts to be done by them.

There was no reasonable doubt that Mr. Ellis associated himself in these substantive acts of mail-fraud by his cohorts; that he participated in the transactions as something he wished to bring about; and that he sought by his own action to make their scheme succeed; accordingly, he is as guilty as his cohorts, *Nye & Nissen* v. *United States* (1949), 336 U. S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919, 925 (headnote 4), because he shared consciously their criminal venture, *Pereira* v. *United States, supra,* 347 U. S. at 11, 98 L. Ed. at 446 (headnote 17). As to each of these counts now under consideration, it was not a prerequisite to a conviction of Mr. Ellis that the cohort actually committing physically the unlawful acted charged have been identified. *Ambrose* v. *United States,* D. C. Tenn. (1974), 384 F. Supp. 681, 682, affirmed C. A. 6th (1974), 508 F. (2d) 843 (table).

Mr. Ellis laid as additional grounds for his motion for a post-trial entry of a judgment of acquittal, as to the foregoing 11

counts, alleged errata in the Court's instructions to the jury. Of course, these could not be, and are not, a cognizable ground for such a motion.

Because of the nature of the evidence as a whole, and the disparity of inferences which could have been drawn therefrom reasonably, especially with reference to any criminal intent of Mr. Ellis, or lack of it, in each instance, this Court is forced to the conclusion that the evidence was such that any reasonable mind might have had fairly a reasonable doubt as to Mr. Ellis' guilt *or* might not have had such a doubt in that respect. "* * * Where [the] intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. * * *" *Morisette* v. *United States, supra,* 342 U. S. at 274, 96 L. Ed. at 306 (headnote 15); *accord: United States* v. *Bryant,* C. A. 6th (1972), 461 F. (2d) 912, 920 [12], and *United States* v. *Luxenberg,* C. A. 6th (1967), 374 F. (2d) 241, 249 [16]. Accordingly, his posttrial motion for entry of a judgment of acquittal as to each of the 11 remaining counts of the indictment must be, and hereby is,

OVERRULED, *cf. United States* v. *Sutton,* C. A. D. C. (1969), 426 F. (2d) 1202, 1210 [11].

Mr. Ellis moved timely also for a new trial, Rule 33, Federal Rules of Criminal Procedure, asserting several alleged errors which had occurred during the trial as grounds therefor. The Court has discretion to determine whether, in the interest of justice, a new trial should be granted. *Petro* v. *United States,* C. A. 6th (1954), 210 F. (2d) 49, 53 [10], certiorari denied *sub nom. Sanzo* v. *United States* (1954), 347 U. S. 974, 978, 74 S. Ct. 785, 790, 98 L. Ed. 1114, 1116. (The Court addresses those grounds only to the extent they have not been addressed earlier herein.)

It is claimed that the Court erred in sending to the jury-room the exhibits which had been admitted in evidence over the objection of Mr. Ellis. His objection extended to all exhibits.

It has long been the practice of the undersigned judge not to send any exhibits to the jury-room unless they are called-for by a deliberating jury, on the theory that documentary evidence should not be emphasized ordinarily above testimonial evidence; and, if any exhibit is sent-in, all are sent-in; to avoid unusually emphasizing any particular piece of the documentary evidence. The Court devoted 5 days to the reception of evidence herein; there were a multiplicity of exhibits admitted into evidence; the jury was asked to return verdicts as to 11 separate crimes, many of which implicated documentary evidence. There was no abuse of the Court's discretion in honoring under the circumstances the jury's request for all the exhibits. *Cf. United States* v. *Foster,* C. A. 6th (1969), 407 F. (2d) 1335, 1336 [3], certiorari denied (1969), 396 U. S. 862, 90 S. Ct. 134, 24 L. Ed. (2d) 114.

Although exhibits admitted on the issues implicated in the counts which were afterward withdrawn from the jury's consideration were included in the delivery, these exhibits continued to have a relevance on its determination of Mr. Ellis' state-of-mind at the pertinent times. *United States* v. *Curtis,* C. A. 10th (1976), 537 F. (2d) 1091, 1097 [13], [14], certiorari denied (1976), 429 U. S. 962, 97 S. Ct. 589, 50 L. Ed. (2d) 330. No error was committed in this matter. *Cf. Neely* v. *United States,* C. A. 9th (1962), 300 F. (2d) 67, 75 [11], certiorari denied (1962), 369 U. S. 864 82 S.Ct. 1030, 8 L. Ed. (2d) 84.

Mr. Ellis also contends that he was prejudiced on the latter counts under which he was convicted by evidence relating to the earlier counts (and apparently *vice versa*). He argues that if the jury had considered separately each count, and only the evidence relating to that particular count, he would not have been convicted. In this connection, the Court instructed the jury as follows:

* * * * * * *

A seperate crime or offense is charged in each of the remaining 11 counts of this indictment. Each offense and the evidence applicable thereto should be considered separately.

The fact that you may find Mr. Ellis guilty, or not guilty, of the offense charged in any one count, should not control your verdict with respect to the offenses charged in the other counts.

* * * * * * * *

The jury must be presumed to have been capable of sorting-out the evidence and considering each count separately. See *United States* v. *Frazier,* C. A. 6th (1978), 584 F. (2d) 790, 795 [10]. This Court is not aware of any specific instance wherein the jury might have been confused by the scope of the proof or was unable to limit the evidence to a single count where so required. See *United States* v. *Grunsfeld,* C. A. 6th (1977), 558 F. (2d) 1231, 1237, certiorari denied (1977), ____ U. S. ____, 98 S. Ct. 219, ____ L. Ed. (2d) ____. In light of the foregoing instructions, it must be assumed that evidence relating to any one count did not taint the verdict of the jury as to any other count. *United States* v. *Parker,* C. A. 9th (1970), 432 F. (2d) 1251, 1255 [3].

The Court is not persuaded by Mr. Ellis' claim of selective prosecution. Some degree of selectivity is inherent in every prosecution, and there is not in this record the slightest intimation that the government's decision to prosecute Mr. Ellis herein was based upon impermissible standards, or that such decision was made in bad faith. See *United States* v. *Cooper,* C. A. 6th (1978), 577 F. (2d) 1079, 1086 [7].

A disturbing ground of Mr. Ellis' motion for a new trial is that the prosecuting attorney was guilty of prejudicial misconduct in undertaking to impeach his character inferentially, by proof that Mr. Pomporini had been convicted during his lifetime of mail-fraud. Mr. Pomporini was deceased at the time of

this trial. Both the prosecuting attorney and defense counsel had developed earlier through witnesses a great deal that Mr. Pomporini was reported to have done and, without objection, said. There had been no previous attack by either party by opinion or reputation evidence or otherwise on the character of Mr. Pomporini for truthfulness. Nonetheless, the prosecuting attorney asked a witness in rebuttal concerning an earlier conviction of Mr. Pomporini for the felony of mail-fraud.

Rule 404 (b), Federal Rules of Evidence, states very plainly that "* * * [e]vidence of other crimes * * * is not admissible to prove the character of a person in order to show that he acted in conformity therewith. * * *" Sub-§ (a) of the same rule reiterates that "* * * [e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: * * *" as related to (1) the accused, (2) the victim of the crime, or (3) a witness "* * * as provided in rules 607, 608, and 609."

As Mr. Pomporini was none of these 3 excepted persons, in so far as this case is concerned, the purpose of the prosecuting attorney must be said to have been to show that Mr. Pomporini acted in conformity with his character as a mail-fraud convict in dealing with Mr. Ellis, and thereby to suggest that the jury infer that Mr. Ellis' conduct was also of a mail-fraud nature.

If such was the purpose of the prosecuting attorney, such evidence was irrelevant and barred: proof of the conduct of a third person is prohibited where the evidence is offered to prove his or her character as a basis for an inference as to his or her conduct; and the conduct of a third person offered to prove the character of the accused is barred as evidence of the defendant's conduct. 22 Wright & Graham, Federal Practice and Procedure, 457-458, Evidence, § 5239. "* * * An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. * * *"

Bruton v. *United States* (1968), 391 U. S. 123, 131, 88 S. Ct. 1620, 20 L. Ed. (2d) 476, 482 [5], n. 6. Testing the credibility of a person by showing a previous conviction of a felony is proper only when the credibility of that person has been put in issue. *United States* v. *Benson,* C. A. 6th (1966), 369 F. (2d) 569, 572 [6].

It is appropriate to repeat here the recent observation of Circuit Judge Keith, of our Court of Appeals, with regard to the great responsibility an attorney for the government bears in prosecuting a person for crime:

* * * * * * * *

> * * * Once again we quote the "oft-repeated and sometimes ignored" [footnote reference omitted] words of the Supreme Court in *Berger* v. *United States,* 295 U. S. 78, 88 (1935):
>
> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

More to the point of the facts of this case are the words of Mr. Justice Douglas:

> The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible

to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.

Donnelly v. *DeChristoforo,* 416 U.S. 637, 648-649 (1974) (Douglas, J. dissenting). *United States* v. *Bess,* C. A. 6th (1979), ____ F. (2d) ____, ____ (no. 78-5095, decided and filed February 28, slip op. pp. 7-8); *accord: United States* v. *Steinkoetter,* C. A. 6th (1979), ____ F. (2d) ____, ____ (no. 78-5331, decided and filed February 28, slip op. pp. 2-3).

Immediately when this improper method of the prosecuting attorney surfaced, the Court took him to task, rebuked him pointedly and sternly in the presence of the jury, and explained to the jury that it would constitute a violation of their own oaths, to decide the guilt or innocence of Mr. Ellis according to law, unless this inappropriate question were disregarded by them. In addition to the instantaneous instructions given the jury upon overruling Mr. Ellis' motion for a mistrial, the Court repeated in the principal instructions afterward:

* * * * * * *

* * * [Y]ou must consider nothing but legal evidence presented before you in support of the charges against Mr. Ellis.

* * * * * * *

* * * [A]ny conviction of Mr. Ellis must be based only on evidence.

* * * * * * *

Any evidence * * * you were instructed by the Court to disregard must be entirely disregarded * * *. You are to consider only the evidence in this particular lawsuit.

* * * * * * *

When the Court sustained an objection to a question addressed to a witness, you must disregard that question; you must draw no inference from the wording of the question; and you must not speculate as to what the witness might have said if he had been permitted to answer.

* * * * * * *

Remember also, please, that Mr. Ellis is not on trial for any act or conduct not alleged in the remaining counts of this indictment. * * * You are not called on to return a verdict as to the guilt or innocence of any other person or persons.

* * * * * * *

"* * * It is the general rule that cautionary instructions to a jury to disregard * * * improper and prejudicial questions * * * are deemed to cure such errors. * * *" *United States* v. *Haskins,* C. A. 6th (1965), 345 F. (2d) 111, 115 [9]. It is believed that the limiting instructions given were sufficient to protect Mr. Ellis' constitutional right to a fair trial. *Cf. Frazier* v. *Cupp* (1969), 394 U. S. 731, 735, 89 S. Ct. 1420, 22 L. Ed. (2d) 684, 691 [2].

Next for consideration is whether Mr. Ellis was prejudiced beyond his constitutional right by this prosecutorial misconduct. In the exercise of its discretion in passing upon the motion of Mr. Ellis for a new trial on this ground, the Court holds in mind the harmless-error provisions of Rule 52, Federal Rules of Criminal Procedure, and will not grant a new trial unless the substantial rights of Mr. Ellis were affected by the method employed. The gravity of the prosecuting attorney's act is an important element in deciding that. *Kyle* v. *United States,* C. A. 2d (1961), 297 F. (2d) 507, 514 [5], certiorari denied (1964), 377 U. S. 909, 84 S. Ct. 1170, 12 L. Ed. (2d) 179.

As the late Circuit Judge Friendly reasoned:

* * * * * * *

> * * * [W]here the conduct of the trial has been less censurable, or not censurable at all, a greater showing of prejudice is demanded, because the interest in obtaining an ideal trial, with the trier of fact considering all admissible evidence that has become available, and nothing else, is not thus supplemented and may not outweighed by the interest in avoiding a retrial unlikely to have a different outcome * * *.

Idem. The method employed by the prosecuting attorney herein is a matter of the gravest concern to the Court; but, it is doubtful that another trial of 6 or more days would be perfect in all of its aspects, or that it would produce a different result.[2]

The Court is not cognizant of any other undesirable or pernicious element which might have infected the proceedings. With only one possible exception, *infra,* it is believed by the Court that the lengthy instructions to the jury are correct.

The convictions of Mr. Ellis fall somewhere naturally into two categories, each of them with one sub-category. The first category related to Mr. Ellis' dealings with Mr. Pomporini with reference to the *Yearbook* and with Messrs. Stamps and Lewellen with regard, first, to the *News,* and, afterward, the *Journal,* and the subcategory is the latter two persons' and Mr. Ellis' causing the mail to be used in implementation of their prearranged plan. The second category related to Mr. Ellis' conver-

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[2] "* * * [I]nstances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' * * *" *Bruton* v. *United States, supra,* 391 U. S. at 135, 20 L. Ed. (2d) at 484, quoting from *Lutwak* v. *United States* (1953), 344 U. S. 604, 619, 73 S. Ct. 481, 97 L. Ed. 593, 604.

sion of union property or funds in connection with the *Yearbook* and in his utilization for private purposes of the union's long distance telephone service, with this sub-category pertaining to his failing to cause to be reported this additional compensation he had received as a result of the telephone use.

The proof of Mr. Ellis' guilt of the charges in these two categories was strongly supported by the evidence of his *acts;* the only really viable questions related to whether he had had the necessary criminal *intent.* As the evidence had shown theretofore that one of his coconspirators, Mr. Stamps, was a convict, this development of the fact that Mr. Pomporini was also a convict probably had little bearing on the jury's decision as to that intent.

Even though this Court is of the considered view that the method employed by the prosecuting attorney had only a minimal degree of potential prejudice to Mr. Ellis under the circumstances, this does not end proper inquiry. The practice of any attorney for the government, in offering prejudical evidence which he or she should know is inadmissible, is condemned throughout this entire circuit; so the delving must go deeper.

The Court (without the benefit of the record before it) cannot now recall any other conduct on the part of the prosecuting attorney on a par with this misconduct; the trial was somewhat long, and this constituted but an isolated incident in it. The Court is not persuaded fully that the attorney for the government used this tactic with the deliberate motive to "nail" Mr. Ellis' "skin to the wall."

It is believed that the action, attitude and actual language of the Court, in seeking to overcome or, at least, dissipate, any prejudice caused Mr. Ellis, was effective in accomplishing that end. The verdicts the jury returned after a surprisingly brief period of deliberation on 11 separate crimes reflects that its members had little difficulty in finding Mr. Ellis guilty as charged on the proof adduced on the trial. Under the aggregate of

those circumstances, the error committed by the prosecuting attorney, while never to be condoned by this Court, may be said safely to have been harmless. *Cf. United States* v. *Leon,* C. A. 6th (1976), 534 F. (2d) 667, 679 [13], citing *inter alia Donnelly* v. *DeChristoforo, supra.*

In the light of this survey, this Court is able to declare beyond a reasonable doubt its belief that this error of the prosecuting attorney affected no constitutional or other substantial right of Mr. Ellis and was harmless in the overall picture. Rule 52, *supra.* This Court has concluded, albeit uneasily, that there was not a reasonable possibility that the question asked contributed to Mr. Ellis' conviction. *Chapman* v. *California* (1967), 386 U.S. 18, 22-24, 87 S. Ct. 824, 17 L. Ed. (2d) 705, 709, 711 [5], [6, 7], rehearing denied (1967), 386 U. S. 987, 87 S. Ct. 824, 17 L. Ed. (2d) 705, and 386 U. S. 987, 87 S. Ct. 1283, 18 L. Ed. (2d) 241.

Mr. Ellis asserts error in the Court's instructing the jury that it had "* * * authority to judge the legitimacy of [u]nion expenditures, judgment which is vested solely in union officials except upon issues as to whether [certain] expenditures violate particular laws prohibiting them." This Court is in agreement with Mr. Ellis, to the extent that a labor organization may expend its funds and assets for any lawful purpose it may see fit; however, this Court does not agree that the exclusive judgment of the propriety of an expenditure of a labor organization is reposed "* * * solely in union officials. * * *"

The Labor-Management Reporting and Disclosure Act, *supra,* imposes a very broad fiduciary duty upon officers of a union to protect the general membership of the union from the corruption of their officers and others. 29 U. S. C. § 501 (a). A union official must "* * * hold its money and property solely for the benefit of the organization and its members * * *, expend the same in accordance with its constitution and bylaws and any resolutions of [its] governing [body] adopted there-

under, * * * refrain from * * * holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and * * * account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. * * *" *Idem.*[3] It very well may be the prerogative of union officials to ascertain initially whether union funds are disbursed in accordance with a union's constitution, bylaws and resolutions adopted thereunder by its governing body; but, whether that determination may be, it must be found to conform to the foregoing statutory mandate.

In charges of a violation of 29 U. S. C. § 501 (c), the courts are in agreement with regard to the essential elements of the crime relating to disbursements which have been authorized by a union. *United States* v. *Bane,* C. A. 6th (1978), 583 F. (2d) 832, 835-836 [2]. The essential elements of that crime are not yet delineated as clearly with relation to unauthorized disbursements. *Ibid.,* 583 F. (2d) at 835; but see and *cf. United States* v. *Goad,* C. A. 8th (1973), 490 F. (2d) 1158, 1166, certiorari denied (1974), 417 U. S. 945, 94 S. Ct. 3068, 41 L. Ed. (2d) 665, *contra: United States* v. *Ottley,* C. A. 2d (1975), 509 F. (2d) 667, 671 [2]. However, by way of dictum, our own Court of Appeals (with the author a member of the adjudicating panel) has approved the giving of an instruction to the jury in such a case, to the effect that a guilty verdict is warranted if funds authorized by a union were not expended within the limitation of the authorization given. *United States* v. *Bane, supra,* 583 F. (2d) at 835, n. 7.

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[3] Interestingly to the Court, the Congress in its wisdom did not make the breach of these fiduciary duties by the officer of a labor union a criminal offense; there must be a violation of 29 U. S. C. § 501 (c) to implicate a criminal penalty under the Act, although a breach of those duties does give rise to a civil action under 29 U. S. C. § 501 (b).

In respect to the telephone calls and use of the union automobile, an issue was whether Mr. Ellis' authorization from the union was exceeded; in respect of the payment to the union by D. & P., an issue was whether Mr. Ellis had embezzled or converted to his use or the use of another person money belonging rightfully to the union.

It was made perfectly clear in *United States* v. *Goad, supra,* 490 F. (2d) at 1166, that, if an official of a union spends funds that have been authorized by the union by mistake or accident, "* * * he is not liable under § 501 (c). * * *" It is clear, furthermore, that, if an official of a union expended union funds which were unauthorized in a good-faith belief that the union would grant authorization after-the-fact, he is not liable under § 501 (c). *United States* v. *Santiago,* C. A. 2d (1976), 528 F. (2d) 1130, 1133-1134 [4], certiorari denied (1976), 425 U. S. 972, 96 S. Ct. 2169, 48 L. Ed. (2d) 795.

Mr. Ellis contended *inter alia* (1) that the money he received from Mr. Pomporini was in repayment of a personal loan and did not represent union-money; (2) that the union disbursement of funds to pay for a long distance telephone call, concerned with his surrogate operation of a union vehicle, was authorized; and (3) that its payment for other telephone calls made for him by Messrs. Akin and Hickman were either (a) authorized by the union or (b) in excess of the permission granted those persons by Mr. Ellis. He contended also that, equitably, he was entitled to a setoff against the foregoing tolls, by the amount he had paid personally for tolls on union business from his private telephone.

In this somewhat hybrid situation, implicating as it does both authorized and unauthorized calls, this Court may or may not have been correct in instructing the jury that it was an essential element of the § 501 (c) crime for the jury to find that Mr. Ellis "* * * did not have a good-faith belief that the particular expenditure was for the legitimate benefit of the union." If incor-

rect, this worked in Mr. Ellis' favor, however; because it required the prosecution to have proved an extra element of his guilt. *Cf. United States* v. *Bone, supra,* 583 F. (2d) at 835, n. 7.

There was no error in the Court's proceeding to entertain a certain tape recording made by an electronic device, which was represented to include thereon voices in a conversation, until it appeared that the prosecution was unable to establish the chain of the pretrial custody of the tape. "* * * [T]he most reliable evidence possible of a conversation * * *" is that provided by an electronic device. *Lopez* v. *United States* (1963), 373 U. S. 427, 439, 83 S. Ct. 1381, 10 L. Ed. (2d) 462, 470 (headnote 7). The proposed exhibit could not be received in evidence, because its chain of custody could not be established sufficiently to lay a foundation for its admission. *Cf. United States* v. *Robinson,* D. C. Tenn. (1977), 367 F. Supp. 1108, 1109-1110 [2].

This Court is unadvised how it might have handled the prospect of this evidence differently or better.

The assertion of Mr. Ellis that the assistant United States attorney, prosecuting this action, may have gained the sympathy of the jurors "* * * as the victim of objections and admonishtions [sic: admonitions] * * *" lacks merit. This, he contends, sprang from the repeated failure of such attorney to deliver material to defense counsel at the times required by the Court, resulting in repeated objections by defense counsel and, consequently, repeated admonishments from the Court.

The Court instructed the jury, *inter alia:*

* * * * * * *

> You are to perform your duty without bias or prejudice to anyone. The law does not permit you to be governed by sympathy * * *; rather, it is expected that you will consider carefully and impartially all the evidence, follow the law as stated to you at this time by the Court, and arrive at

the verdict on each remaining count of the indictment which you think is just, fair and right under all the proof.

* * * * * * *

* * * [Y]ou must consider nothing but legal evidence presented before you in support of the charges against Mr. Ellis.

* * * * * * *

Remember, it is the duty of lawyers to object * * *.

* * * * * * *

Remember always, please, that you are not partisans. You are not for or against the government; you are not for or against Mr. Ellis. You are judges, judges of the facts. Your sole interest is to ascertain the truth of this matter from the evidence presented before you.

* * * * * * *

* * * [K]eep constantly in mind that it would be a violation of your sworn duty to base your verdicts on anything but the evidence and the law in this particular case.

It isn't ever a question of whether our government wins or loses a case; because, our government always wins when justice is done,—regardless of whether the verdict of the jury is guilty or not guilty.

* * * * * * *

Nothing occurring during the trial, even so trivial a thing as a facial expression or a voice inflection, or anything else which occurred, is to suggest to you any intimation of what the Court thinks your verdicts should be.

* * * * * * *

Absent anything to rebut it (save the conclusion of Mr. Ellis), "* * * it must be presumed that the jury conscientiously observed * * *" these instructions of the Court. *Shotwell Mfg. Co.* v. *United States* (1963), 371 U. S. 341, 367, 83 S. Ct. 448, 9 L. Ed. (2d) 357, 375 (headnote 22).

Thus, there was no plain error, and if this Court committed any error in the trial of Mr. Ellis, it did not affect his substantial right and is to be disregarded, Rule 52, *supra.* For such reason the interest of justice does not require that a new trial be granted. Rule 33, *supra.* His motion for a new trial, therefore, hereby is

DENIED.

ENTER:

(C. G. Neese)
United States District Judge
by designation

APPENDIX B

NO. 79-5098

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

vs.

William L. Ellis,
Defendant-Appellant.

ORDER

(Filed March 24, 1980)

BEFORE: WEICK, LIVELY AND JONES, Circuit Judges.

The Defendant appeals from his conviction of six counts of conspiracy and mail fraud, 18 U.S.C. §371, 1341, and 1342 and on five counts of conversion to his own use of money or property of a labor organization. We affirm.

The question posed by this appeal is whether there was substantial evidence to support these convictions. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *United States* v. *Conti,* 339 F.2d 10, 13 (6th Cir. 1964).

The Defendant was charged with one count of conspiracy (to defraud by use of the U.S. Postal Service) and five substantive counts of mail fraud in connection with solicitation of money for advertisements for the "Tennessee Labor Journal." The standard of proof necessary to sustain a conviction for mail fraud was set forth in this Circuit's opinion in *United States* v. *Talbott,* 590 F.2d 192, 195 (1978):

"Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pereira* v. *United States,* supra, 347 U.S. at 8-9, 74 S. Ct. at 363.

A use of the mails which "is not a step toward receipt of the fruits of the scheme is not covered by Section 1341." *United States* v. *Staszcuk,* 502 F.2d 875, 880 (7th Cir. 1974) modified 517 F.2d 53, cert. den. 423 U.S. 837, 96 S. Ct. 65, 46 L.Ed. 2d 56 (1975). However, a conviction is warranted if use of the mails was foreseeable. *United States* v. *Hasentab,* 575 F.2d 1035 (2nd Cir. 1978) (emphasis added).

The Defendant contends that a conspiracy to violate the mail fraud statute cannot be proved unless it is shown that the conspirators intended or contemplated that the mail would be used to carry out the scheme. The government argues that a conviction for conspiracy to commit mail fraud can be sustained if it is shown participants who are not aware of mailings are nevertheless responsible for the mailings which are caused by other members of the scheme in its furtherance. Culpability for conspiring to commit an illegal act requires only that one *agree* with others to commit acts which constitute the substantive offense. *United States* v. *Craig,* 573 F.2d 455, 485 (7th Cir. 1977). There is substantial evidence to support the conviction on the conspiracy charge based on this standard.

Counts one through six of the Indictment alleged that the Defendant's involvement with Lewellen and the "Labor Journal are unlawful. The Defendant argues that the government proved two business schemes: Stamps' "Labor News" scheme without proof that it either used or contemplated use of the mails, and Lewellen's "Labor Journal" scheme as to which it failed to prove that Ellis was a party.

This view of the interrelationship of the alleged activities is simplistic. Essentially, Stamps' "Labor News" is the predecessor to Lewellen's "Labor Journal." The evidence of the Defendant's involvement establishing Stamps' "Labor News" found by the District Court to be sufficient for a jury verdict on mail fraud is based upon the testimony of his coconspirator and other evidence admitted at trial as to this scheme. There is substantial evidence to support the District Court's finding that the establishment of these journals constitute one scheme.

The fourteenth count of the indictment alleges that the Defendant converted to his own use $1,000.00 due the Union on its contract with D&P Associate, Inc., in violation of 29 U.S.C. §501(a). On behalf of the Union, the Defendant contracted with D & P Associates, Inc. whereby D&P would publish three annual editions of the Tennessee Teamsters' Yearbook and the Union would be paid a minimum of $1,000.00/year from the proceeds. The Union Executive Board approved the contract. None of the cash consideration was ever paid to the Union. Mr. Pomporini, (representing D & P Associates) paid the Defendant $500.00 on two occasions (the Defendant testified the money was in repayment of a personal loan).

Although the foregoing evidence is circumstantial, a jury, discrediting the Defendant's testimony, could reasonably infer the two $500.00 payments, an amount equal to the money due the Union, and paid in close proximity to each other, was money due to the Union. In addition, the contract between the Union and D & P Associates lacked the signature and concurrence of the Union's Secretary-Treasurer.

The last two counts concern the abuse of Defendant's union position for personal gain. There was extensive testimony and evidence introduced as to abuse of the Union's telephone and telephone credit cards for Defendant's personal benefit. The evidence was indirect, but it was sufficient to sustain this convic-

tion unless the jury gave full weight to testimony excuplating the Defendant. A rational Jury could find beyond a reasonable doubt that Defendant's innocent explanation was false.

The court has considered the Defendant's other arguments and finds them without merit.

Accordingly, the Judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

APPENDIX C

NO. 79-5098

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

William L. "Corky" Ellis,
Defendant-Appellant.

ORDER

(Filed May 23, 1980)

BEFORE: WEICK, LIVELY AND JONES, Circuit Jones

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

APPENDIX D

STATUTES

18 U.S.C. § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisonment not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

29 U.S.C. § 431:

(a) Every labor organization shall adopt a constitution and by-laws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information—

(1) the name of the labor organization, its mailing address, and any other address at which it maintains its principal office or at which it keeps the records referred to in this subchapter;

(2) the name and title of each of its officers;

(3) the initiation fee or fees required from a new or transferred member and fees for work permits required by the reporting labor organization;

(4) the regular dues or fees or other periodic payments required to remain a member of the reporting labor organization; and

(5) detailed statements, or references to specific provisions of documents filed under this subsection which contain such statements, showing the provision made and procedures followed with respect to each of the following: (A) qualifications for or restrictions on membership, (B) levying of assessments, (C) participation in insurance or other plans, (D) authorization for disbursement of funds of the labor organization, (E) audit of financial transactions of the labor organization, (F) the calling of regular and special meetings, (G) the selection of officers and stewards and of any representatives to other bodies composed of labor organizations' representatives, with a specific statement of the manner in which each officer was elected, appointed, or otherwise selected, (H) discipline or removal of officers or agents for breaches of their trust, (I) imposition of fines, suspensions, and expulsions of mem-

bers, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures, (J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes, and (M) issuance of work permits. Any change in the information required by this subsection shall be reported to the Secretary at the time the reporting labor organization files with the Secretary the annual financial report required by subsection (b) of this section.

(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe.

(c) Every labor organization required to submit a report under this subchapter shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 439:

(a) . . . .

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

. . . .

29 U.S.C. § 501:

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold

its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.